SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1368

JOSEPH DENTI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

Joseph Denti is seeking a writ of certiorari to review an order of the New York State Appellate Division, First Department, entered January 21, 1975, which unanimously affirmed his conviction in the Supreme Court of New York County for POSSESSION OF GAMBLING RECORDS IN THE FIRST DEGREE (N.Y. Penal Law §225.20). *People* v. *Denti*, 47 A.D. 2d 513 (1st Dept. 1975). Following that conviction, Denti had been sentenced on July 2, 1974 to an indeterminate term of imprisonment with a maximum of three years. He is presently serving this sentence. Leave to appeal the decision of the Appellate Division to the Court of Appeals was denied by Judge FUCHSBERG of the Court of Appeals on February 3, 1975.

Introduction

On July 18, 1972, Joseph Denti and Joseph Sarcinella were arraigned on an indictment charging them with having possessed gambling records in the first degree on April 24, 1972. Indictment No. 2408-72. Both defendants pleaded not guilty and moved to suppress "any and all evidence seized from the physical or constructive possession of the defendants herein on the 24th day of April, 1974."* Following an evidentiary hearing the trial court granted the suppression motion on July 3, 1973.

The People appealed that decision to the Appellate Division, First Department, as authorized by Section 450.20 of the New York Criminal Procedure Law. On March 12, 1974, the Appellate Division unanimously reversed the trial court's decision. *People* v. *Denti*, 44 A.D.2d 44 (1st Dept. 1974), leave to appeal denied by Wachtler, J.

In May of 1974, the trial of Denti and Sarcinella was commenced before a jury. At the conclusion of the People's case, the court dismissed the case against Sarcinella. Denti's motion for the same relief was denied. Denti called no witnesses in his defense. The jury found him guilty of criminal possession of gambling records in the first degree as charged in his indictment. On July 2, 1974, Denti was sentenced to an indeterminate term of imprisonment with a minimum of one year and a maxmum of three

* The items seized were $7,095 in cash, $3,354 in cash, gambling records for $9,095 in wagers and gambling records for $57,000 in wagers.

years. His conviction was unanimously affirmed by the Appellate Division. *People* v. *Denti*, 47 A.D.2d 513 (1st Dept. 1975), leave to appeal denied by FUCHSBERG, J.

The Instant Petition

Denti asks this Court to grant a writ of certiorari to review the decision of the Appellate Division. He claims that the evidence seized from him at the time of his arrest should have been suppressed because "it was a violation of the Fourth and Fifteenth Amendments of the United States Constitution to have stopped petitioner's vehicle and then conduct a search of his person and car." He also claims that the "presumption of Penal Law Section 225.35 (1) is unconstitutional as applied herein." Neither of these claims present a substantial constitutional question which would warrant further review of Denti's conviction by this Court.

POINT I

The conduct of the police officers which led to the discovery of the evidence against Denti was reasonable and did not violate any of his constitutional rights [answering Point I of Petitioner's Brief].

On the night of April 25, 1972, Officers Schachtel, Shanahan and Mednick of the Narcotics Division of the New York City Police Department were on plainclothes duty. They were seated in a parked Volkswagen maintaining a surveillance of a location on 116th Street where narcotics were reportedly being sold (4-6, 38, 40, 63).* An automobile driven by two Hispanics passed the officers' car three times and Officer Mednick called the other officers' attention to it (7, 44). When this car passed the officers a fourth time, they decided that, if it passed a fifth time, they would follow it (44). It did, and the officers followed behind as "it would go down one street, more or less make circles around the neighborhood, go three blocks, make a right, come up a block, make another right. It would go two or three blocks at a time and then make a change of direction, come up on to St. Nicholas, down Amsterdam, whatever, whichever way the street ran" (45).

Eventually this car stopped at St. Nicholas Avenue and 166th Street (45). There, a 1969, four-door Buick driven by Denti, with Sarcinella seated next to him, pulled alongside the Hispanics' parked car (7, 45-46). The two Hispanic men left their car and got into the rear of Denti and

* Numerical references are to the pages of the minutes of the suppression hearing.

Sarcinella's vehicle (7, 45-46). The foursome then drove away and proceeded "erratically * * * in circles" with "no destination" with the policemen following them (7, 47).

After approximately ten minutes of driving, Denti and his companions returned to the first car and double-parked next to it (4, 47). Officer Schachtel, followed by his partners, got out of the Volkswagen, and Officer Schachtel walked over to Denti's window and identified himself as a police officer (8, 47-48). Officer Schachtel asked Denti for his license and registration (8, 48). Denti was unable to produce either a license or registration. He claimed, however, that the car was owned by his wife (8-9, 48). It would have been proper for Officer Schachtel to have then arrested Denti for driving without a license or registration. However, he did not do so.

From where he was standing outside the car, Officer Schachtel was able to see a two or three-inch high stack of money on the front seat between Denti and Sarcinella. This money was "piled up with a piece of [news]paper around the sides, but the top was exposed. You could see all the money" (9-10, 57, 61, 68). When Officer Schachtel asked all four occupants of the car whose money this was, two of them stated that they did not know and the other two shrugged their shoulders (10).* Officer Schachtel then pointed to the car from which the men in the back of Denti's car had come, and asked all four men whose car that was. All four responded that they did not know (49).

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* The exact testimony of Patrolman Schachtel was:

> I asked everybody. I, first, I think I asked Mr. Denti if it was his money, and I asked Mr. Sarcinella. Now, I do not remember, one of them said it was not his money and the other shrugged. I don't remember which one it was, and I asked the two men in the back seat whose money it was, and they, one shrugged and the other one said it wasn't his money (10).

The officers then asked all four men to get out of the car where the exterior of their clothing was patted down "to see if they had any weapons on them" (11, 50). No search was conducted and no items were seized.

In view of the earlier suspicious conduct of the occupants of the car and Denti's inability to produce a license or a registration, these unresponsive and evasive answers concerning the money and the other car gave the officers probable cause to believe that the two men on the back seat of the car were guilty of possessing stolen money and at least one stolen automobile. Thus, the officers had probable cause to arrest the occupants of the car and search their person. However, rather than formally arrest the suspects, the officers asked the men to come with them to the 34th Precinct (65). This was done so that the officers could further investigate the ownership of the car and the money found on the front seat which had been counted and amounted to $9,095 (11, 13, 64-65, 67).

Officer Schachtel entered the right rear of the Buick and sat immediately next to Sarcinella, Denti sat to Sarcinella's left, Officer Mednick drove the Buick to the precinct, and Officer Shanahan drove the other automobile (11-12, 13). Upon arrival, Mednick parked the Buick opposite the 34th Precinct on the "fairly well lit" street (71-2), Officer Schachtel got out and was followed by Sarcinella and Denti and the two Hispanics, all four of whom Patrolmen Shanahan and Mednick accompanied across the street to the police station (12, 73, 75, 79). Officer Schachtel then looked at the rear seat and the rear floor area of the car where he, Denti and Sarcinella had been seated and observed a partly folded piece of paper on the right-hand side

of the floor. The paper was lying face-up, and from the lines of numbers written on the paper, the officer recognized it as a "pay and collect slip"—a gambling record which shows "the tally for who they're collecting money from and paying off" (73-4, 77). Officer Schachtel picked up the piece of paper (12, 74). [This "pay and collect" slip indicated a total amount to be collected of $9,095, the same amount as contained in the stack of money which had been on the seat between Denti and Sarcinella (12, 24-5, 73).]

Instead of "shout[ing] across" the street to his partners and the suspects about his discovery, Officer Schachtel immediately followed them into the precinct house and arrested the foursome for possession of gambling records (25, 75, 79). They were searched and an additional $3,354 was found in Sarcinella's right-hand pants pocket (37, 83) which the policemen vouchered on the theory that this money constituted "proceeds from gambling" (54).

Immediately after arresting and searching the defendants, Officer Schachtel returned to the Buick and conducted a further search. He discovered additional pay and collect slips representing $57,000 in wagers concealed behind an upright arm-rest which was located in the center of the car's front seat at a point directly behind where the $9,095 had been lying on that seat (25-6, 28-9).

Based on these slips, Denti was convicted of possessing gambling records in the first degree.*

* The court charged the jury that Denti could not be found guilty of possessing the "pay and collect" slip for $9,095 which had been seen on the rear floor of the car. Minutes of Trial, at 393.

At each step of the investigatory process followed by the police officers in this case, they acted well within the established guidelines for police conduct. The initial inquiry by Officer Schachtel concerning Denti's license and registration was fully justified by the highly unusual and suspicious behavior of Denti and his three companions, which the officers had observed. *Terry* v. *Ohio*, 392 U.S. 1, 32-33 (1968); *cf. Rios* v. *United States*, 364 U.S. 253 (1960), *on remand*, 192 F. Supp. 888 (S.D. Calif. 1961). Denti's inability to produce either a driver's license or a registration for the vehicle gave the officer probable cause to arrest him for driving without a license or registration. N.Y. Vehicle and Traffic Law §§401(18), 509(1); N.Y. Criminal Procedure Law §140.25; N.Y. Penal Law §§10.00(1)(2), 60.20. However, he did not arrest Denti, but made further inquiry about the bundle of cash seen on the front seat of the car and about the ownership of the car parked alongside, which Denti's passengers had been seen driving.

The evasive and incredible answers given by Denti and his companions to the officers' questions about the $9,097 and the ownership of the parked car gave the officers probable cause to arrest Denti and his companions for the criminal possession of stolen property. *Cf. Peters* v. *New York*, *aff'd sub nom., Sibron* v. *New York*, 392 U.S. 40, 48-49, 66-67 (1968) (An off-duty police officer heard a noise at the door of his apartment and saw the defendant and another man tiptoeing away. When the officer slammed the door of his apartment, the defendant and his companion fled down the stairs. This flight, coupled with the defendant's refusal to identify a girl he claimed he had been

visiting in the building, gave the officer probable cause to arrest him for attempted burglary.) Although the officers could have arrested Denti and his companions at this point, they chose instead to detain them while they further investigated the matter at the station house. The frisk of Denti, which produced no evidence, was a reasonable self-protective measure under the circumstances, since the officers were going to be riding with Denti and his companions in the car as they returned to the station house.

Since Officer Schachtel was legitimately inside the automobile when he saw the gambling record in plain view on the floor in front of the back seat, his seizure of that item of contraband was proper. Moreover, discovery of that gambling record, which reflected $9,097 in wagers, precisely the amount of money which had been on the front seat of the car, gave the officer probable cause to believe that the car contained additional evidence of gambling law violations. Therefore, the search of the car immediately after the arrest of Denti and his companions in the station house was proper. *Chambers* v. *Maroney,* 399 U.S. 42 (1970). Therefore, the Appellate Division correctly held that petitioner's motion to suppress that evidence should have been denied. As the Appellate Division said, "Analysis of the police activity in the case at bar exemplifies legal and proper police work resulting in an arrest based upon probable cause." *People* v. *Denti,* 44 A.D. 2d 44 (1st Dept. 1974).

POINT II

Denti's guilt was adequately proven.

Denti claims that the discovery of the "pay and collect" slips for the amount of $57,000 under the arm-rest in the middle of the front seat of the car he had been driving did not suffice to establish that he had knowingly possessed those slips, as found by the jury.* In support of that claim he argues that the statutory presumption of New York Penal Law Section 225.35(1) is unconstitutional. This section provides that "Proof of possession of any gambling device or of any gambling record specified in sections 225.15 and 225.20, is presumptive evidence of possession thereof with knowledge of its character or contents." This presumption is rebuttable. *People* v. *Brimfield,* 40 Misc. 2d 993 (Nassau Co. 1963) (dealing with the predecessor to this section).

A presumption is constitutional, if "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary* v. *United States,* 395 U.S. 6, 36 (1969). It cannot be doubted that one who "possesses"—that is,

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* The jury had been instructed that Denti could not be found guilty of possessing the gambling record found in the rear of the car. Minutes of Trial, at 393. Penal Law §225.20, of which Denti was convicted, states that:

> A person is guilty of possessing gambling records in the first degree when, with knowledge of the contents thereof, he possesses a writing paper or instrument or article:
>
> 1. Of a kind commonly used in the operation or promotion of a bookmaking scheme or enterprise, and constituting, reflecting or representing more than five thousand plays or chances therein.

one who "exercises dominion or control"* over contraband usually knows what it is he possesses. Moreover, it is not unreasonable to require the defendant to come forward with evidence to rebut this presumption, since whether a defendant actually knows the nature of what he possesses is peculiarly within his knowledge. As this Court said in *Morrison* v. *California*, 291 U.S. 82, 88-89 (1934):

> The limits are in substance these, that the State shall have proved enough to make it just for the defendant to be required to repel what has been proved * * * or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.

In any event, the jury did not have to rely upon the statutory presumption to find that Denti possessed the slips with knowledge of their contents. The suspicious conduct of Denti and his companion and his patently false denial of knowledge about why more than $9,000 in cash was on the front seat of his car made it clear that he knowingly possessed the gambling records found almost directly under that money.

The petitioner's claim that there was insufficient evidence that he physically possessed the gambling slips, found next to where he was seated in the car he was driving, is frivolous and hardly presents a constitutional question.

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* "Possess" is defined in the New York Penal Law as "to have physical possession or otherwise to exercise dominion or control over tangible property." N.Y. Penal Law §10.00(8).

Conclusion

The petition should be denied.

Respectfully submitted,

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